No. 09-1418

JUN 23 2010

IN THE

Supreme Court of the United States

THE PRESBYTERIAN CHURCH OF SUDAN, REV. MATTHEW MATHIANG DEANG, REV. JAMES KOUNG NINREW, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., FATUMA NYAWANG GARBANG, NYOT TOT RIETH, individually and on behalf of the Estate of her husband JOSEPH THIET MAKUAC, STEPHEN HOTH, STEPHEN KUINA, CHIEF TUNGUAR KEIGWONG RAT, LUKA AYOUL YOL, THOMAS MALUAL KAP, PUOK BOL MUT, CHIEF PATAI TUT, CHIEF PETER RING PATAI, CHIEF GATLUAK CHIEK JANG,

Petitioners,

v.

TALISMAN ENERGY INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR MALCOLM N. SHAW IN SUPPORT OF CONDITIONAL CROSS-PETITIONER

PROFESSOR MALCOLM N. SHAW QC *
ESSEX COURT CHAMBERS
24 Lincoln's Inn Fields
London WC2A 3EG
UK
(+ 44) 207 813 8000
mshaw@essexcourt.net

* Counsel of Record

June 23, 2010

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INTEREST OF THE *AMICUS CURIAE* [1]

Amicus curiae respectfully submits this brief pursuant to Supreme Court Rule 37 in support of the Conditional Cross-Petitioner. *Amicus* is the Sir Robert Jennings Professor of International Law at the University of Leicester, UK, and a practising barrister at Essex Court Chambers, London, with the rank of Queen's Counsel. *Amicus'* CV appears as an appendix to this brief. *Amicus* believes this submission will assist the Court regarding pertinent jurisdictional rules of international law as they may bear on the issues raised in this appeal.

SUMMARY OF ARGUMENT

In *Sosa*, this Court required that the Alien Tort Statute ("ATS") be interpreted in the light of customary international law and that any alleged custom must be "specific, universal and obligatory." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). International law requires that the practise of States underpinning any custom must be extensive and virtually uniform. It is my conclusion that there is no rule of international law providing for jurisdiction that would cover the instant case.

Jurisdiction in international law is a permissive rule that focuses upon permitted primary jurisdiction

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[1] No counsel for any party authored this brief either in whole or in part. The written consents of petitioners and respondent to the filing of this brief have been filed with the Clerk. Counsel for respondent received timely notice of intent to file this brief. Counsel for petitioners received such notice seven days prior to the filing, but waived the ten-day notice requirement of Rule 37.2(a). Respondent-Conditional Cross-Petitioner Talisman Energy Inc. has compensated me for my time spent preparing this submission.

(essentially territorial or national). Beyond this, universal criminal jurisdiction is exceptional and carefully circumscribed. It requires that the offense in question be of a heinous nature and that the offense be so recognized by the States of the international community. Further, it is predicated upon the inability or unwillingness of the primary jurisdictions (territorial or national) to take action. Finally, it is almost universally accepted that the absence of the alleged offender constitutes a bar to the exercise of jurisdiction. The concept of universal criminal jurisdiction does not constitute an open license to exercise judicial authority with regard to offenses committed abroad by non-nationals against non-nationals.

Even less well established in international law is the exercise of universal civil jurisdiction founded upon asserted violations of international criminal law. At the very least, such exercise would have to meet the requirements of universal criminal jurisdiction. In addition, any purported exercise of universal civil jurisdiction is contingent upon satisfaction of the principle of reasonableness. Of the factors that are relevant to this principle would be the degree of connection between the court asserting jurisdiction and the essence of the dispute concerning the conduct abroad of foreign parties. Another relevant factor would be whether a State with a primary jurisdictional link (*e.g.* territoriality or nationality) could provide a fair and effective alternative forum. The failure to exhaust domestic remedies in an appropriate jurisdiction also constitutes a pertinent factor in any consideration of the existence or not of an asserted universal civil jurisdiction.

It is concluded that the assertion of jurisdiction in this case over Talisman Energy based upon the

contacts of Fortuna (U.S.) Inc. ("Fortuna"), one of Talisman's subsidiaries, with the State of New York is unreasonable and thus contrary to principles of international law and comity relating to civil jurisdiction. This is particularly so upon a consideration of the fact that the connection between Fortuna and Talisman Energy with regard to the events in Sudan giving rise to the claims is non-existent and that Canada, the State of registration of Talisman Energy, possesses a credible and independent legal system with a high standard. Indeed, Canada has objected to the exercise of the U.S. courts' jurisdiction.

In addition, I have come to the conclusion that there is no rule of customary law with the necessary support of States providing for corporate liability.

ARGUMENT

I. The U.S. District Court's Assertion Of Jurisdiction In This Case Involving Claims By Sudanese Plaintiffs Against A Canadian Corporation Based On Events That Occurred In Sudan Is Contrary To International Law And Comity.

A. International Law Requires Near Universal Acceptance in Order to Create an International Norm.

A rule of customary international law is one defined as "evidence of a general practice accepted as law." Statute of the International Court of Justice, Art. 38. This requires careful consideration of concrete evidence of the customs and practices of States. *See, e.g., Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 250, 252 (2d Cir. 2003). The International Court of Justice has emphasised that:

> an indispensable requirement would be that within the period in question, short though it may be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked and should moreover have occurred in such as way as to show a general recognition that a rule of law or legal obligation is involved.

North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 43 (Feb. 20). *See also Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 108-09 (June 27).

The standard thus required of the norm of customary law alleged is accordingly high. In *Filartiga v. Pena-Irala* it was characterised as "clear and unambiguous." 630 F.2d 876, 884 (2d Cir. 1980); in *Kadic v. Karadjic* as "well-established" and "universally recognized." 70 F.3d 232, 239 (2d Cir. 1995); and in *Sosa* as "specific, universal and obligatory." 542 U.S. at 732. It is as well in this context to note the comment of Lord Oliver in the House of Lords decision in *JH Rayner v. Dep't of Trade & Ind.*, to the effect that

> A rule of international law becomes a rule – whether accepted into domestic law or not – only when it is certain and is accepted generally by the body of civilized nations, and it is for those who assert it to demonstrate it, if necessary before the International Court of Justice. It is certainly not for a domestic tribunal in effect to legislate a rule into existence for the purposes of domestic law and on the basis of material that is wholly indeterminate.

[1990] 2 AC 418, 513.

B. The *Sosa* "Paradigms" Reflect the Restrictive Nature of Jurisdiction in International Law

This Court in *Sosa* determined that any asserted rule of customary international law required within the context of the Alien Tort Statute ("ATS") needed to be defined with a "specificity comparable to the features of the 18th-century paradigms we have recognized" and "acceptance as widespread." 542 U.S. at 725, *id.* at 760 (Breyer J., concurring). Such paradigms were Blackstone's "three primary offenses: violation of safe conducts, infringement of the rights of ambassadors and piracy." *Id.* at 724. It is important to note that two of these offenses were committed *within* the forum State against foreign nationals and it was found necessary to establish the forum State's jurisdiction and provide redress in order to prevent "serious consequences in international affairs" up to and including resort to war. *Id.* at 715. Piracy was the only offense committed outside of the jurisdiction of the forum State. Indeed being committed on the high seas, piracy was outside of the jurisdiction of all States as such. *Id.* at 762 (Breyer, J., concurring) (citing *United States v Smith*, 5 Wheat. 153, 162 (1820)).

It *is*, thus, *clear* that *none* of the *Sosa* paradigms concern the proscription of conduct that has taken place within the territorial boundaries of another sovereign state, precisely the situation at issue in the current litigation.

International law allows for the exercise of jurisdiction by a State in carefully circumscribed situations. Matters that fall without permitted limits would not be accepted in international law and by third States as a valid exercise of jurisdiction. The permitted

situations are defined in terms of the following: conduct occurring on the territory of the State (the territorial principle), conduct engaged in by its own nationals (the nationality principle), conduct by non-nationals that is directed against the security of the State (the protective principle), and in more limited circumstances, conduct by non-nationals directed against nationals abroad (the passive personality principle) and conduct outside its territory that has or is intended to have substantial effect within its territory (the effects doctrine). *See Oppenheim's International Law*, 458 (9th ed. 1992). *See also Restatement (Third) of the Foreign Relations Law of the United States* ("Restatement"), § 402 (1987). Jurisdiction exercised by a State on the basis of the above principles would be seen as falling within the scope of international legality and legitimacy. The international norm is permissive rather than obligatory and it is for each State to formulate its national jurisdictional requirements as it wishes, so long as the required international legal framework is complied with. In any event, none of the traditional bases of jurisdiction set out above apply in the current situation.

C. Universal Criminal Jurisdiction is Only Recognized, if at all, In Extremely Limited Circumstances.

Beyond the traditional bases of jurisdiction noted in the previous paragraph, a State may exercise universal jurisdiction in limited circumstances with regard to certain offenses regarded by the international community as of universal concern. This is an exceptional jurisdiction and flows from the heinous nature of the crime itself coupled with the clear recognition as such by the international community

Most States and scholars advocate a cautious approach to the exercise of universal jurisdiction "which should be governed by clear rules in order to ensure legal certainty, to guarantee a fair trial for the accused and to prevent the abuse of universal jurisdiction for political ends." Florian Jessberger, *Universal Jurisdiction*, in The Oxford Companion to International Criminal Justice, 556 (Antonio Cassese ed.-in-chief 2009). The Institut de Droit International adopted a resolution on Universal Criminal Jurisdiction in 2005 in which it stressed that, "the jurisdiction of States to prosecute crimes committed by non-nationals in the territory of another State must be governed by clear rules in order to ensure legal certainty, and the reasonable exercise of that jurisdiction." *http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf*. Strong U.S. and international pressure led to the 2003 Belgian amendment to its extensive 1993 and 1999 universal criminal legislation. *See* S. Ratner, *Belgian War Crimes Statute: A Postmortem*, 97 The American Journal of International Law, No. 4, 888 (Oct. 2003).

1. Universal Criminal Jurisdiction Only Applies to a Very Limited Set of International Law Violations.

That offenses deemed subject to universal jurisdiction are those of a particularly heinous nature is amply reflected in the list of offenses argued to fall within this form of jurisdiction, such as genocide, war crimes and crimes against humanity. There is thus a qualitative requirement. Such crimes are those regarded as being "directed against the most fundamental legal interests of the international community—such as world peace and international security." Jessberger, at 556. This is a high threshold and

it should be emphasized that Talisman Energy is not accused of having directly committed such crimes.

There is also a quantitative requirement forming part of the definition of crimes of universal jurisdiction. This is that the offenses in question are "regarded by the community of nations as of universal concern." *Restatement*, § 404. Accordingly, a high level of consensual State practice is necessitated. This is an indispensable requirement. Any claim that a particular offense falls within the context of universal jurisdiction must, therefore, be maintained by clear evidence that, first, all or virtually all States have accepted the conduct in question as constituting an offence and, secondly, that such States have recognized such conduct as constituting an offense of the necessary heinous nature.

The Court of Appeals noted in *United States v. Yousef*, 327 F.3d 56, 103 (2d Cir. 2003), that "the universality principle permits jurisdiction over only a limited set of crimes that cannot be expanded judicially." Such expansion can only take place on the basis of the State consent tests as noted above. Evidence is entirely lacking as to the international acceptance of aiding and abetting or conspiratorial conduct (the only offenses that Talisman Energy has been accused of) as constituting the requisite heinous conduct for the purposes of universal criminal jurisdiction, even assuming that international law recognizes corporate liability for complicit conduct (which is denied).

Even with regard to offenses commonly mentioned in this context, care needs to be exercised. Piracy is an offense against international law, but universal jurisdiction may only be exercised with regard to piracy on the high seas or other areas outside of the

national jurisdiction of States and not elsewhere. *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. Other offenses laid down in international conventions, such as terrorism, drug-trafficking and torture, do not provide as such for universal jurisdiction, but set out a jurisdictional framework as between the contracting States founded upon the traditional bases for the exercise of jurisdiction. *See, e.g.*, United Nations Convention against Torture, Art. 5, Dec. 10, 1984; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Art. 4, 1988; International Convention Against the Taking of Hostages, Art. 5, *opened for signature* Dec. 18, 1979; International Convention for the Suppression of Terrorist Bombings, Art. 6, *adopted* Dec. 15, 1997. This caution is reflected in the current consideration by the Sixth (Legal) Committee of the United Nations General Assembly of the question of the scope and application of the principle of universal jurisdiction. *See* G.A. Res. 64/117, U.N. Doc. A/64/452 (Dec. 16, 2009).

2. Universal Criminal Jurisdiction is a Subsidiary Form of Jurisdiction.

The Institut de Droit International resolution emphasised that, "all States bear primary responsibility for effectively prosecuting the international crimes committed within their jurisdiction or by persons under their control" and referred to universal criminal jurisdiction as "an *additional* ground of jurisdiction." *http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf* (emphasis added). It should be emphasised that Canada, the State of nationality of Talisman Energy, has been willing to exercise jurisdiction and has expressly objected to the exercise of U.S. court jurisdiction for that reason.

The presumption in favour of territorial jurisdiction is strong. Wherever possible, States will, naturally, not only prosecute all offenses taking place on their territory, but will leave the prosecution of offenses taking place abroad to the State in whose territory the offense has been committed. Indeed, the United Nations anti-terrorist treaties positing the exercise of an expanded jurisdiction with regard to alleged offenders require the prosecution or extradition of any alleged offender found within the territory of the State exercising jurisdiction. *See, e.g.*, International Convention against the Taking of Hostages, Art. 5, International Convention for the Suppression of Terrorist Bombing, Art. 6, International Convention for the Suppression of Acts of International Terrorism, Art. 10.

This is for obvious reasons of respect for State sovereignty and the practical advantages of allowing for the exercise of jurisdiction by the State on whose territory the bulk of witnesses and evidence may be found. Judge Guillaume in his Separate Opinion in *Arrest Warrant of April 11, 2000 (Congo v. Belg.)*, 2002 I.C.J. 3, 43-44 (Feb. 11), concluded that:

> States primarily exercise their criminal jurisdiction on their own territory. In classic international law, they normally have jurisdiction in respect of an offence committed abroad only if the offender, or at least the victim, is of their nationality, or if the crime threatens their internal or external security. Additionally, they may exercise jurisdiction in cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory. But apart from these cases, international law does not

> accept universal jurisdiction, still less does it accept universal jurisdiction *in absentia*.

During the course of the debates in Parliament on the International Criminal Court Bill, the Parliamentary Under Secretary of State of the UK Foreign Office declared that

> The primary responsibility for the investigation of crimes committed outside of the United Kingdom lies with the state where the crime occurred, or whose nationals were responsible . . . . The British criminal justice system is based on a territorial link to the United Kingdom and there are significant practical difficulties when our courts have to prosecute crimes that have taken place elsewhere in the world . . . . It is our policy to assume universal jurisdiction only where an international agreement expressly requires it.

620 PARL. DEB., H.L. (5th ser.) (2001) 928-29.

The requirement for the exercise of universal jurisdiction by domestic courts in the case of the egregious crimes noted above essentially arises due to the inability or unwillingness of the primary jurisdictional States (that is the State on whose territory the alleged offense has taken place or the State of nationality of the alleged offender) to prosecute and where there is no relevant international court or tribunal with the requisite jurisdiction. In terms of international legal policy, the aim is to prevent the legal impunity of those committing heinous offenses. *See, e.g.*, Rome Statute of the International Criminal Court, Preamble, July 12, 1999. It follows, therefore, that where the relevant territorial or national State is willing and able to take action, the need for a

domestic court of a third State to exercise universal jurisdiction falls away.

This point may be taken further. The exercise of universal jurisdiction by the domestic court of a third State may indeed raise issues concerning priority of jurisdiction and the danger of offending the principle of non-intervention. As a matter of general legal principle, the territorial State or the national State are accorded primacy as against other States with regard to the exercise of jurisdiction (and in the absence of a relevant international court or tribunal). *See, e.g.*, Jessberger, at 557, who emphasises that "[t]he exercise of universal jurisdiction should be understood as a fall-back mechanism activated only if no primary jurisdiction is willing and able to genuinely prosecute the crime."

The jurisdictional structure of the International Criminal Court, which accords primacy of jurisdiction in pertinent cases (genocide, war crimes, and crimes against humanity) to either the territorial or national State, is of relevance here. The Statute of the International Criminal Court makes it clear that that court can only exercise jurisdiction upon the failure or unwillingness of the territorial or national State as the case may be to so act. *See* Rome Statute, Arts. 12, 17; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 335 *et seq.* (Oxford University Press 2010).

Justice Breyer, in his concurring opinion in *Sosa*, indeed questioned whether the exercise of jurisdiction under the ATS was "consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement." 542 U.S. at 761. Such comity concerns arise, he noted, when

"foreign persons injured abroad bring suit in the United States under the ATS, asking the courts to recognize a claim that a certain kind of foreign conduct violates an international norm." *Id.* The need to work towards international harmony does not automatically mean that even if there is harmony as to substantive regulation across relevant States, then universal jurisdiction is appropriate. *Id.* at 761-62. Justice Breyer emphasized that the key to extra-territorial jurisdiction concerned "procedural consensus" and the absence of this would constitute a factor in concluding that the ATS would not apply in any given situation. *Id.* at 763.

3. Universal Criminal Jurisdiction Requires That the State Exercising Such Jurisdiction Have Custody of the Defendant.

The Institut de Droit resolution described above (*see* p. 7, above) emphasizes that the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State or on board a vessel flying its flag or an aircraft which is registered under its laws, or other lawful forms of control over the alleged offender. Judge Guillaume in his Separate Opinion in the *Arrest Warrant* case declared clearly that international law did not accept the concept of universal jurisdiction *in absentia*. *See* p. 11, above. The presence of the accused is usually required in order to conduct the necessary investigations and to compile and order evidence and deal adequately with witnesses. This position is reinforced by awareness of the dangers that may exist with regard to double jeopardy (*ne bis in idem*) and politicisation.

The District Court held that it could exercise personal jurisdiction over Talisman Energy in this case in view of the contacts of Fortuna with the State of New York. *Presbyterian Church of Sudan v. Talisman Energy Inc.*, No. 01 Civ. 9882, 2004 WL 1920978 (S.D.N.Y. Aug. 27, 2004). However, such contacts would not suffice to comply with the requirements laid down in international law concerning the exercise of universal criminal jurisdiction, even assuming that international law recognizes corporate liability (which is denied). It is to be particularly noted that Fortuna's contacts with Talisman Energy are entirely unrelated to events in Sudan giving rise to the claims.

In summary, the following propositions may be concluded as to universal criminal jurisdiction as a matter of international law. First, the offense has to attain a high level of egregious or heinous behaviour. Second, universal criminal jurisdiction is a subsidiary form of jurisdiction only exercised where the State or States of primary jurisdiction cannot or will not act. Third, it is accepted by most States, particularly those of the common law tradition, that the presence of the alleged offender is required. The concept of universal criminal jurisdiction does not constitute an open license to exercise judicial authority with regard to offenses committed abroad by non-nationals against non-nationals.

D. The Expansive Exercise of Domestic Civil Jurisdiction Based on Violations of International Criminal Law Is Contrary to International Law.

This Court in *Sosa* made the point that it was one thing for American courts to enforce constitutional limits on U.S. State and Federal governments' powers,

"but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed these limits." 542 U.S. at 727. This principle would apply logically where the inevitable consequence of a civil action against a foreign corporation necessarily implied a judgment on the actions of a third State. It should be underlined that the Canadian government's brief concluded that "[a]ssertions of jurisdiction in this action, as a practical consequence, would infringe on Canada's conduct of foreign policy and its relations with other States." Brief of Amicus Curiae The Government of Canada in Support of Dismissal of the Underlying Action at 11, *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 582 F.3d 244 (2d Cir. 2009) (07-cv-0016).

Since the ATS must be interpreted in the light of international law, it is important to draw attention to the point made by Judges Higgins, Kooijmans and Buergenthal in their Separate Opinion in the *Arrest Warrant of April 11, 2000 (Congo v. Belg.)*, 2002 I.C.J. at 77, that the ATS could be seen as the "beginnings of a very broad form of extraterritorial jurisdiction" in the civil sphere, but that "it has not attracted the approbation of States generally." The House of Lords has underlined this position, noting that the ATS and related caselaw do not express principles that are widely shared and observed among other nations. *See, e.g., Jones v. Saudi Arabia* [2006] UKHL 26 at ¶ 20.

This is far from the "procedural consensus" test propounded by Justice Breyer, which would help determine the applicability of the ATS in any particular situation. The views of academic writers, which in

themselves do not constitute sources of international law, but merely evidence as to what the relevant rules may or may not be, are clearly divided. *See, e.g.*, M. Akehurst, *Jurisdiction in International Law*, 46 British Year Book of International Law 145, 177 (1972-73); F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 Recueil des Courts 1, 73-81 (1964); F. A. Mann, *The Doctrine of Jurisdiction in International Law Revisited After Twenty Years*, 186 Recueil des Cours, 19, 20-33, 67-77 (1984).

This Court in *Sosa* noted that the possible collateral consequences of making international rules privately actionable argue for judicial caution and constituted a reason for the "high bar to new private causes of action for violating international law." 542 U.S. at 727. Amongst such consequences were the potential implications for the foreign relations of the U.S. in recognizing such causes and this "should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* Attempts by federal courts to craft remedies for the violation of new norms of international law "would raise risks of adverse foreign policy consequences" and "should be undertaken, if at all, with great caution." *Id.* at 727-28. Although this Court referred to "a policy of case-specific deference to the political branches" that need not be applied in the *Sosa* case itself, it did note that a number of class actions were pending seeking damages from corporations alleged to have participated in or abetted the former apartheid regime in South Africa and concluded that "In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Id.* at 733 n.21. The U.S. government argued in its brief in this case

before the Court of Appeals that "claims under the ATS should not be recognized if they arise within the jurisdiction of another sovereign" and declared that "[o]ne of the 'practical consequences' of embracing civil aiding and abetting or civil conspiracy liability for ATS claims would be an uncertainty that would interfere with the ability of the U.S. Government to employ its full range of foreign policy options . . . [and] would inevitably lead to greater diplomatic friction for the United States." Brief for the United States as *Amicus Curiae* at 10, 19-21, *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 582 F.3d 244 (2d Cir. 2009) (07-cv-0016).

Even if one were to assume that international law permitted the exercise of a universal civil jurisdiction, which is denied, a State may not exercise jurisdiction with respect to a person or activity having connections with another State when the exercise of such jurisdiction is unreasonable.

Brownlie concludes that extraterritorial acts can only be the object of jurisdiction if *inter alia* there is a "substantial and bona fide connection between the subject-matter and the source of the jurisdiction," *Principles of Public International Law*, 311 (7th ed., 2008) ("Brownlie"). It may be concluded, therefore, that paucity of connection between the court asserting jurisdiction and the essence of the dispute concerning the conduct abroad of foreign parties would be one such "unreasonable" factor. Another relevant factor would be where a State with a primary jurisdictional link (*e.g.* territoriality or nationality) could provide a fair and effective alternative forum. *See, e.g.*, D. F. Donovan & A. Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 Am. J. of Int'l L. 142, 145 (2006). Such would be the case

with regard to Canada, the State of nationality of Talisman Energy. *See also F. Hoffman La Roche Ltd v. Empagran S A.*, 542 U.S. 155, 164 (2004), noting that this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.

There is a further point at this stage and that is the application of the international law requirement of the exhaustion of domestic remedies. This is a principle of long-standing whereby before a person can take action on the international level, the domestic remedies of the relevant jurisdiction must first be exhausted. *See, e.g.*, Brownlie, at 473, 492-502. Such a requirement may apply in circumstances such as the present as the ATS requires going to international law and this principle constitutes one of the relevant principles of international law. The Torture Victim Protection Act 1991 provides in section 2(b), in the context of civil action, that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." Indeed this Court in *Sosa* left the matter open in referring to the European Commission *amicus curiae* brief's claim that domestic remedies need to be exhausted and concluding that "[w]e would certainly consider this requirement in an appropriate case." 542 U.S. 733 n.21. Justice Breyer also regarded this condition as important in his concurring opinion. *Id.* at 760. In any event, the existence of valid remedies in a State with a much closer connection to the relevant parties than the U.S. must constitute a pertinent reasonableness factor.

The District Court held that under New York jurisdictional rules it had jurisdiction in this case based upon Fortuna's contacts with the State of New York. *Presbyterian Church of Sudan v. Talisman Energy Inc.*, No. 01 Civ. 9882, 2004 WL 1920978 (S.D.N.Y. Aug. 27, 2004). I express no opinion on New York law. However, such exercise of jurisdiction in terms of international law was unreasonable and thus contrary to principles of international law and comity relating to civil jurisdiction. This argument is even stronger when it is taken into account that the connection between Fortuna and Talisman Energy with regard to the events in Sudan giving rise to the claims is non existent and that Canada, the State of registration of Talisman Energy, possesses a credible and independent legal system with a high standard. For US courts to seek to pre-empt the Canadian legal system from adjudicating this dispute may constitute interference with the domestic jurisdiction of Canada.

II. International Law Does Not Recognize Corporate Liability.

In order for Talisman Energy to be brought within the reach of the ATS, it must be shown that international law establishes the direct liability of corporations for breaches of the rules of public international law and that *on the basis of the tests propounded in Sosa* as to widespread acceptance and specificity, duly noting the requirement to exercise "great caution," and the "demanding standard of definition." 542 U.S. at 725, 728, 738 n.30. However, it is very clear that international law does not establish the direct liability of corporations for breaches of international law in any way relevant to the current litigation. *See, e.g., Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 321 (2d Cir. 2007) (Korman, J.,

concurring in part and dissenting in part). There are clear policy reasons underpinning this as significant national variations exist as to the attribution of corporate liability. *See, e.g.*, International Commission of Jurists, 2 Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, 58 (2008); Special Representative of the U.N. Secretary-General (Professor John Ruggie), *Report on Implementation of Gen. Assembly Res. 60/251 of 15 March 2006 Entitled "Human Rights Council,"* U.N. Doc. A/HRC/4/35, ¶ 28 (Feb. 9, 2007). I have seen and agree with Professor Crawford's brief on this matter, Brief of Amicus Curiae Professor James Crawford in Support of Conditional Cross-Petitioner, *Presbyterian Church of Sudan v. Talisman Energy Inc.*, No. 09-1418.

The key point is that both the required practice of states and the *opinio juris* necessary to establish a rule of customary international law are simply absent. General international law does not recognize the international legal personality of multinational corporations. *See, e.g.*, Brownlie, at 66. Further, thus far, no international criminal tribunal has had jurisdiction to try a company as a legal entity for crimes under international law. *See* International Commission of Jurists, at 5. Nor, to the best of my knowledge, have there been any decisions of international courts or tribunals where a corporation has been found liable, either criminally or civilly, for a breach of international law. None of the constituent instruments of the international criminal tribunals thus far established has expressly provided for corporate criminal responsibility. *See* The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, Art. 6, 82

U.N.T.S. 279, Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 6, May 25, 1993, 32 I.L.M. 1203, Statute of the International Criminal Tribunal for Rwanda, Art. 5, Nov. 8, 1994, 33 I.L.M. 1598. Indeed, the attempt by France to bring corporations within the jurisdiction of the International Criminal Court failed due to the absence of consensus on this matter among national legal systems. Rome Statute, Art. 25; Albin Eser, *Individual Criminal Responsibility in* 1 The Rome Statute of the International Criminal Court: A Commentary 767, 778-79 (A. Cassese *et al.* eds., 2002).

The fact that certain treaties exist that call those States parties to them to impose particular rules upon corporations or other groups or individuals generally does not as such convert such entities into international legal persons as distinct from objects of concern nor does it convert an obligation placed upon States parties into a direct obligation upon such entities. A requirement that States parties to a particular treaty agree under the terms of that treaty to treat a particular pattern of behaviour as criminal *under its own criminal law* is not the same as a provision placing direct liability for a breach of international law upon entities that may include corporations. To take as an example, article 5(1) of the United Nations Convention Against Transnational Organized Crime 2000 provides that "[e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally . . . ." 2225 *U.N.T.S.* 209. *See also id.* at Arts. 6(1), 7(1), 8(1) and 9(1).

Under article 10(1), States parties agree to "adopt such measures as may be necessary, *consistent with its legal principles*, to establish the liability of

legal persons for participation in serious crimes." (emphasis added). Similar provisions may be found in articles 5(1), 14(1), 15 and 16 of the United Nations Convention Against Corruption 2003, article 4 of the International Convention for the Suppression of the Financing of Terrorism 1999, and article 1 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997. The very fact that in such circumstances, whether with regard to terrorism or corruption or bribery or disposition of hazardous wastes the international community felt it necessary to call upon States parties to the relevant treaties to make particular offences domestic crimes and to prosecute or otherwise implement such provisions within their own legal order demonstrates clearly that international law as such does not impose direct liability upon international corporations.

No human rights treaties impose direct liability upon corporations as such, but rather such treaties typically call upon States parties to respect particular human rights and, in most cases, to report to international bodies upon their implementation of such rights. It was upon an analysis of such treaties that led the United Nations Special Representative for Business and Human Rights to conclude that "it does not seem that the international human rights instruments discussed here currently impose direct liabilities on corporations." *See* Ruggie, at ¶ 44. This was true of the situation as at 2007, it must surely have been the situation during the relevant period for the purposes of this litigation and it remains correct today.

CONCLUSION

For these reasons, the exercise of jurisdiction under the ATS would be contrary to the principles of international law and comity.

Respectfully submitted,

PROFESSOR MALCOLM N. SHAW Q.C. *
ESSEX COURT CHAMBERS
24 Lincoln's Inn Fields
London WC2A 3EG
UK
(+44) 207 813 8000
mshaw@essexcourt.net

* Counsel of Record

June 23, 2010

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